NO. 81-1619-CFX	TITLE Georgia-Pacific Corporation, Petitioner
VIDE: 81-1618	v. Lyman Lamb Company, et al.

DOCKETED	COURT
Mar. 2, 1982	United States Court of Appeals for the Fifth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Frederick P. Furth
	Counsel for Respondents: Harold E. Kohn, Dale E. Fredericks, Herbert J. Garon
Mar. 2, 1982	Petition for writ of certiorari filed. (Record filed).
Mar. 2, 1982	Appendix filed.
Mar. 8, 1982	Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae filed.
March 11, 1982	Motion of The Business Rountable for leave to file a brief as amicus curiae filed. (Vide: 81-1618).
March 11, 1982	Motion of National Association Manufacturers for leave to file a brief as amicus curiae filed. (Vide: 81-1618).
March 22, 1982	Response of Lyman Lamb Company, et al. to the motions of the Chamber of Commerce of the United States, The National Association of Manufacturers, The Business Roundtable, et al, for leave to file briefs amicus curiae filed. (Vide: 81-1619).
March 31, 1982	Brief for the respondents in opposition field. (Vide: 81-1618).
Apr. 7, 1982	Reply brief for the petitioner filed.
Apr. 7, 1982	DISTRIBUTED. 4-23.
Apr. 14, 1982	Supplemental brief of respondents in opposition filed. (D). (Vide: 81-1618).
Apr. 27, 1982	DISTRIBUTED. 4-30.
May 10, 1982	REDISTRIBUTED. 5-13.
May 17, 1982	The motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae is GRANTED. The motion of The Business Roundtable for leave to file a brief as amicus curiae is GRANTED. The motion of National Association of Manufacturers for leave to file a brief as amicus curiae is GRANTED. The motion of Bowie-Sims-Prange, Inc., et al. for leave to file a brief as amici curiae in No. 81-1618 is GRANTED. Petition GRANTED. The case is consolidated with 81-1618 and a total of one hour is allotted for oral argument. White and O'Connor, JJ., OUT.

June 8, 1982	Order extending time to file the joint appendix and petitioners' brief on the merits until Aug. 16, 1982.

(Over)

No. 81-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA-PACIFIC CORPORATION,
Petitioner

v.

LYMAN LAMB COMPANY, PLYWOODS DISTRIBUTING COMPANY, BATON ROUGE LUMBER COMPANY, CITY OF ARKADELPHIA, ARKANSAS, *et al.*,
Respondents.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States (or "Chamber"), pursuant to Rule 36.1 of the Rules of this Court, hereby moves for leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari,[1] and in support of its motion states:

1. The Chamber is the largest federation of corporations, trade associations, chambers of commerce and individuals engaged in business and the professions, with an aggregate membership in excess of 200,000.

2. The Chamber regularly presents its views to this Court and the lower federal courts on a number of public

[1] This motion is necessitated by the failure of the Respondents to consent to the filing of the brief; the Petitioner has given its consent.

policy issues of concern to the business community, including matters of antitrust law.[2]

3. The instant case presents a unique question concerning the proper method of calculating damages in private antitrust litigation which the Chamber believes merits review by this Court. In the area of antitrust law, no less than in any other area of the law, predictability is obviously desirable. Because the charge of the district judge to the jury concerning the method of computing damages and the jury's special verdict that the defendants are liable for damages (Appendix I) represent a departure from established principles of antitrust damages computation, this decision will remain as an unfortunate cloud upon litigants' ability to predict, at as early a stage as practicable, the amount of the potential recovery. This case cannot be dismissed merely as an anomaly which will neither be noticed nor followed by other courts. The magnitude of the potential class recovery itself at the same time magnifies both any perceived inadequacies in the courts' opinions and the likelihood that the opinions will be followed. Since the opinions below permit private antitrust litigants to focus upon one element of the price of a product, without regard for the total price, in assessing damages, then this case can only be viewed as a harbinger of increasingly larger judgments which are premised upon theories which, the Chamber believes, are at variance with the basic purpose and goals of the antitrust laws. And, the Chamber believes, the decisions of the lower courts here create precisely that type of uncertainty as to the determination of the amount of actual damages which is inappropriate when that amount can be trebled. As previously stated, Supreme Court review is appropriate to

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[2] *U.S.* v. *U.S. Gypsum*, et al. 438 U.S. 422 (1978); *First National Maintenance Corp.* v. *NLRB* ____ U.S. ____, 69 L.Ed2d 318 (1981); *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute* 448 U.S. 607 (1980); *Gould Corp.* v. *NLRB*, 612 F.2d 728 (3rd Cir. 1979); *Kouba* v. *Allstate*, No. 81-8131 (9th Cir.).

resolve this uncertainty now, rather than await future, perhaps equally troubling, applications of the principles of damage calculation which are both explicit and implicit in the decisions below.

WHEREFORE, the Chamber respectfully requests that its motion be granted.

Respectfully submitted,

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Respondents.

STATEMENT OF INTEREST

The Chamber of Commerce of the United States (or "Chamber") respectfully refers this Court to the interest articulated in its Motion for Leave to File a Brief *Amicus Curiae* to which this brief is attached.

REASONS FOR GRANTING THE WRIT

The Chamber respectfully suggests that resolution of the propriety of the measure of damages[1] used in this case is particularly important in view of the fact that private antitrust actions initiated each year remain at a high level, and national

[1] This *amicus curiae* brief is limited to the issue of the measure of damages applied by the Fifth Circuit. The Chamber takes no position with regard to the merits of plaintiffs' antitrust complaint.

class action antitrust suits, involving massive amounts of money, are increasing.[2] The opinion of the Fifth Circuit below has important implications for all those cases. Supreme Court guidance could eliminate or substantially reduce needless litigation over damage calculation issues, would ensure some continued measure of predictability in the calculation of the potential gain of the plaintiff or loss of the defendant, and, therefore, could encourage early settlements of many cases: a result that could benefit all concerned.

It is against this backdrop that the Chamber requests the Court to grant petitioner's request for Supreme Court review. For not only are staggering sums of money involved directly in this case, but the outcome of this case can portend a continuation of massive claims which are based upon a questionable method of calculating damages.

The instant case arose out of the defendants' historically based practice of quoting the price of plywood sold from their southern mills with "west coast freight" added to the base or "mill" price.[3]

Plywood was originally manufactured only in the Pacific Northwest. Freight from that location to any purchaser, wherever located, was easily calculated by reference to the standard shipping zones. Hence, the practice arose in the industry of quoting a "delivered" price of plywood in terms of the base or "mill" price plus "west coast freight."

Subsequent technological innovations allowed the manufacture of plywood using types of lumber available in the South. Accordingly, defendants established manufacturing facilities in the South. In what the Federal Trade Commission and the Ninth Circuit characterized as "a natural development"

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[2] The Annual Report of the Director of the Administrative Office of the United States indicates that on the average, over 1350 private antitrust cases have been filed each year since 1971. *See also*, Ross, *A Philadelphia Lawyer's Class-Action Gold Mine*, Fortune, September 7, 1981 at 100.

[3] The underlying facts, the proceedings below, and before the Federal Trade Commission and Ninth Circuit, are fully described in petitioners' briefs. We will not burden the Court with a detailed repetition of that information, but respectfully refer the Court to those briefs.

at its inception, the southern mills priced their plywood using the "west coast freight" convention for quoting price. *Boise Cascade Corp.* v. *Federal Trade Commission,* Appendix, J-2. Inasmuch as during the early years of the southern plywood industry, western plywood retained a dominant market share, (*Id.*) this method of pricing allowed purchasers to make a ready comparison of the prices of the Southern mills and those in the Pacific Northwest.

In this regard, the Ninth Circuit found, "Since southern plywood was widely viewed as inferior in quality to western plywood, it was necessary to sell southern plywood at a slightly lower price." *Id.* " The use of west coast freight made possible ready comparison between Western and Southern plywood prices, [and] encouraged expansion of southern mills...."[4] Appendix, J-2-3.

This finding is at the heart of the Chamber's concern over the method of computing damages utilized by the Fifth Circuit in this case. For the Fifth Circuit virtually ignored the facts that defendants had utilized western freight precisely so that they could compete with western plywood, and, more importantly, had reduced the mill price so as to provide a competitive "delivered" price.

Despite these facts, the Fifth Circuit found that the measure of the plaintiffs' damages was the total difference between the western freight charged, and what the actual freight would have been. *In Re Plywood Antitrust Litigation,* Appendix, A-10. No offset was allowed for the reduced mill price given to the purchasers, and no analysis of the "delivered" prices was undertaken.

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[4] Utilization of eastern shipping rates would not have sufficed since eastern freight was computed on a point to point basis while western freight was computed by zones. *Boise Cascade Corp.* v. *F.T.C.,* Appendix, J-2 at n.1. (9th Cir. 1980)

By examining the western freight charge in isolation, the Fifth Circuit ignores well-established principles of determining damages in cases involving price fixing or other means of price enhancement. *See generally,* Harrison, *The Lost Profits Measure of Damages in Price Enhancement Cases,* 64 Minn. Law Review 751, 751-763 (1980). Prior to the Fifth Circuit's decision, it was well established that the,

> "fundamental objective of an award of damages is to place the plaintiff in the position in which he would have been but for the violation [footnote omitted]. In cases involving price fixing among sellers . . . , the basic measure of a purchaser's damages is the difference between the price paid by the purchaser and the price that would have been paid in the absence of the violation." [footnote omitted].

Adams and Bock, *Damages in Horizontal Price Fixing Cases,* 49 Antitrust Law Journal 141, 142 (1980). *Accord, Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U.S. 390, 396 (1906). Because of the interrelationship between the mill price and the western freight charge, it defies these principles to determine the differences in delivered price by examining the western freight charge alone.

Moreover, we believe the Fifth Circuit's conclusion violates this Court's recent holding in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*,[5] that plaintiffs in Clayton Act cases must prove more than mere violation to recover damages under §4. While the Court in *Payne* recognized that plaintiffs attempting to prove damages in §4 cases should not be held to a rigorous standard of proof, we suggest that inherent in the Court's rejection of automatic damages there is the proposition that the damages awarded to plaintiffs accurately measure the loss they have suffered.

The Fifth Circuit in essence admitted that its holding did not necessarily result in an accurate measure of the damages to the plaintiffs, stating that "given proof of the fact of injury, proof of losses which border on the speculative is allowed . . .", Appendix, A-10. But Section 4 of the Clayton Act

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[5] 451 U.S. 557 (1981)

awards the successful plaintiff in an antitrust action, "threefold the damages *by him sustained.*" 15 U.S.C. §15 (1976) (Emphasis added).

We submit that the Fifth Circuit's use of an inaccurate measure of damages that "borders on the speculative" contradicts the plain meaning of Section 4, as well as past decisions of this Court. Section 4, as noted above, only allows recovery for actual damages sustained. Here the Fifth Circuit goes one step further, awarding damages never incurred by the plaintiffs.

As the Honorable Cecelia H. Goetz [6] has noted:

> Where the fact of damage has been established, the courts are required to be liberal with respect to the degree of certainty required to prove its dollar amount, *although not to the point where reliance is placed on speculation or guesswork:*
>
> > Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, *while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. Story Parchment Co.* v. *Paterson Parchment, Paper Co.*, 282 U.S. 555, 563 (emphasis added).

Goetz, *The Basic Rules of Antitrust Damages*, 49 Antitrust Law Journal 125, 129 (1980) (emphasis added).

The Second Circuit has similarly stated that the "true measure of damages is the price increment caused by the anticompetitive conduct that originated or augmented the

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[6] Bankruptcy Judge, United States District Court for the Eastern District of New York.

monopolist's control over the market. * * * Accordingly, a purchaser may recover only for the price increment that 'flows from' the distortion of the marketplace caused by . . . anti-competitive conduct." *Berkey Photo, Inc.* v. *Eastern Kodak Co.*, 603 F.2d 263, 297 (1979).

The Fifth Circuit's application of an erroneous measure of damages stands these principles on their heads. The court apparently believes that the application of a measure of damages that is not based on the actual loss to the plaintiffs enhances the deterrent effect of the antitrust laws. *In Re Plywood Antitrust Litigation*, Appendix, A-10.

Section 4 of the Clayton Act is, of course, designed to both "deter violators and deprive them of the 'fruits of their illegality', and 'to compensate victims of antitrust violations for their injuries'." (citations omitted) *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 314 (1978).

The Chamber respectfully suggests, however, that inasmuch as the punitive nature of antitrust damages arises from the statutory trebling, it is contrary to both congressional intent and basic concepts of fairness to additionally penalize defendants by trebling damages the plaintiffs never incurred.

Professor Areeda has, in fact, suggested that it is unfair to subject defendants to treble damages,

> when novel principles are established, the law is unclear, or even where the liability determination rests on close and uncertain economic factual determinations . . .
>
> Thus, an appropriate scheme would reserve treble damages, like criminal sanctions, for well-defined offenses; provide for single damages in other cases; and perhaps even preclude damages where a previously unimpaired precedent is overruled.

2 P. Areeda & D. Turner, Antitrust Law §322, at 105 (1978). Professor Areeda's logic is particularly appropriate here, where,

on identical facts, two circuits have differed as to the existence of the violation.[7]

While Professor Areeda's suggestion calls for legislative action, the principle he espouses, that only economically sensible measures of damage be employed, is equally applicable here. Before plaintiffs can begin to prove their individual losses, the court must settle upon a formula that will accurately measure those losses. Then, any ambiguity in the proof of the individual plaintiff's losses can be viewed liberally in their favor. But where an accurate yardstick to measure the damages can be easily established, it defies logic to use a measure that "borders on the speculative."

CONCLUSION

The Chamber of Commerce respectfully urges that the petition for certiorari be granted.

Respectfully submitted,

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[7] The Chamber does not urge that treble damages are necessarily inappropriate in a case of this type, but rather points to Professor Areeda to demonstrate that it was particularly unjust for the Fifth Circuit to treble damages never incurred by the plaintiffs.

81-1619

Title

No.

DATE	PROCEEDINGS AND ORDERS
uly 21, 1982	Application for leave to file the petitioner's brief on the merits in excess of page limitations, and order granting same, by Marshall, J., not to exceed 75 pages.
Aug. 13, 1982	Brief, amicus curiae, for the U.S. filed. (vide 81-1618)
Aug. 16, 1982	Brief for petitioners Weyerhaeuser Company and Willamette Industries, Inc. filed. (Vide 81-1618)
Aug. 16, 1982	Joint appendix filed (Vide 81-1618)
Aug. 16, 1982	Motion of The Business Roundtable, et al. for leave to file a brief as amici curiae filed. (Vide: 81-1618)
Aug. 18, 1982	Brief for the petitioner, Georgia-Pacific Corp. filed. (Vide: 81-1618)
Aug. 26, 1982	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for additional time for oral argument filed. (Vide: 81-1618)
Sept. 13, 1982	Order extending time to file respondents' brief on the merits until Oct. 15, 1982.
Sept. 17, 1982	Motion of City Investing Company and The International Telephone and Telegraph Corporation for leave to file a brief as amici curiae filed. (Vide: 81-1618).
Oct. 4, 1982	The motion of The Business Roundtable, et al. for leave to file a brief as amici curiae is GRANTED. The motion of City Investing Company, et al. for leave to file a brief as amici curiae is GRANTED. The motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument is GRANTED, and ten additional minutes are allotted for that purpose. White, J., OUT.
Sept. 30, 1982	Application for leave to file respondent's brief on the merits in excess of page limitations, and order granting same by Marshall, J., 10/4/82, not to exceed 70 pages.
Oct. 14, 1982	Brief, amici curiae, of the States of Alaska, Arizona, et al., in support of respondents filed. (Vide: 81-1619).
Oct. 14, 1982	Motion of Forty-One States and the District of Columbia for leave to participate in oral argument as amici curiae and for additional time for oral argument filed. (Also in 81-1618)
Oct. 15, 1982	Brief for the respondents filed. (Vide: 81-1618).
Oct. 15, 1982	Motion of the National Lumber and Building Material Dealers Association for leave to file a brief as amicus curiae filed. (Vide: 81-1618).
Oct. 15, 1982	Motion of respondents for relief from compliance with Rule 28.1 filed.
Oct. 25, 1982	DISTRIBUTED. 10-29. (Above motion).

(Card No. 2)

NO. 81-1619-CFX	TITLE Georgia-Pacific Corporation, Petitioner v. Lyman Lamb Company

DOCKETED	COURT
Mar. 2, 1982	United States Court of Appeals for the Fifth Circuit

DATE	PROCEEDINGS AND ORDERS
Nov. 1, 1982	The motion of Alaska, et al. for leave to participate in oral argument as amici curiae and for additional time for oral argument is DENIED. The motion of National Lumber and Building Material Dealers Association for leave to file a brief as amicus curiae is GRANTED. White J., OUT.
Nov. 1, 1982	REDISTRIBUTED. 11-5. (Motion of respondents for relief from compliance with Ruel 23.1).
Nov. 8, 1982	The motion of respondents for relief from compliance with Rule 28.1 is GRANTED. White, Powell, and O'Connor, JJ., OUT.
Dec. 14, 1982	Reply brief of petitioners', Weyerhaeuser Company, et al. filed.
June 14, 1983	Dismissed under Rule 53.